Supreme Court, U. S.
FILED
AUG 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. 76-233

CITY OF DAYTON,

RESPONDENT

VS.

WALTER OTTO,

Petitioner

* *

PETITION FOR WRIT OF CERTIORARI

* *

WALTER OTTO

1017 LINDA VISTA AVENUE, APT. 8

DAYTON, OHIO 45405

PETITIONER IN PERSON

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. _____

CITY OF DAYTON,

Respondent

vs

WALTER OTTO,

Petitioner

* *

PETITION FOR WRIT OF CERTIORARI

* *

Petitioner, Walter Otto, prays that a Writ of Certiorari issue to review the final judgment or decree of the Supreme Court of Ohio in the above entitled proceeding, as rendered and entered June 11, 1976 in Case No. 76-314 upon the docket of that court.

I. REFERENCE TO REPORTS OF OPINIONS BELOW

At this time petitioner is unaware of any publications of any opinions delivered in the courts below.

II. GROUNDS OF JURISDICTION OF THIS COURT

Jurisdiction of this court is invoked on grounds the Supreme Court of the State of Ohio, the highest court of the State of Ohio in which a decision could be had, has rendered a final judgment or decree dismissing an appeal, where the validity of Section 806-31 of the Code of

General Ordinances of the City of Dayton, State of Ohio, is drawn in question on the ground of its being repugnant to the due process of law clause of Amendment 14 to the Constitution of the United States; and, where a right is specially set up or claimed under the due process of law clause of Amendment 14 to the Constitution of the United States.

The judgment or decree sought to be reviewed was made and entered on June 11, 1976.

There is no order respecting a rehearing in this case, nor other order granting an extention of time within which to petition for certiorari.

The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari is Title 28, United States Code, Section 1257 (3).

III. QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 806-31 of the Code of General Ordinances of the City of Dayton, State of Ohio, making it an offense, punishable by imprisonment and fine, for any person merely to fail to obey the order of a housing inspector, is too indefinite, restrictive and liberty or property depriving to represent a proper and authorized exercise of the police power and is invalid in such respect, on the ground of its being repugnant to the due process of law clause of Amendment 14 to the Constitution of the United States.

2. Whether the act of the Municipal Court of Dayton, Ohio, imposing judgment and criminal penalties upon the accused, in a case tried by jury, without any jury verdict finding the accused guilty of any offense alleged in the affidavit, occurring at any time or at any place within the State of Ohio, is an act as deprives the accused of fundamental rights of liberty or property, without due process of law,

as specially set up or claimed under Amendment 14 to the Constitution of the United States.

3. Whether the act of a trial court imposing judgment and criminal penalties upon a jury verdict never filed in the record of the trial court, and never signed by any juror, and never received in open court by any judge or magistrate in the presence of any juror or the accused, and as never did exist in the case, is an act as deprives the accused of fundamental rights of liberty or property, without constitutional due process of law, as specially set up or claimed under Amendment 14 to the Constitution of the United States.

IV. CONSTITUTIONAL PROVISIONS AND LAWS INVOLVED

Constitution of the United States, Amendment 4:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Constitution of the United States, Amendment 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherin the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Constitution of the United States, Amendment 14, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or inforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, United States Code, Section 1257 (3)
Section 1257, State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

***

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

(June 25, 1948, ch. 646, 62 Stat. 929.)

Code of General Ordinances of the City of Dayton, State of Ohio, Section 806-31:
Section 806-31. NOTICE OF VIOLATIONS.
Whenever the Housing Inspector determines that there has been a violation of any provision of this ordinance, excepting violation of Section 806-30, he shall give notice of such violation to the person or persons responsible therefore and order compliance with the ordinance, as hereinafter provided. Such notice and order shall:

(a) Be put in writing on an appropriate form;

(b) Include a list of violations, refer to the section or sections of the ordinance violated and order remedial action which,

if taken, will effect compliance with the provisions of this ordinance;

(c) Specify a reasonable time for performance;

(d) Advise the owner, operator or occupant of the procedure for appeal; excepting emergency orders issued pursuant to Section 806-35 and citations issued pursuant to Section 806-29 C. G. O.

(e) Be served upon the owner, occupant or agent in person provided, however, that such notice and order shall be deemed to be properly served upon, such owner, occupant, or agent if a copy thereof is sent by registered mail to his last known address and a copy is posted in a conspicuous place in or on the dwelling affected.

Any person failing to comply with the order served pursuant to this section shall be deemed guilty of a misdemeanor and subject to penalties set fourth in Section 806-83C, C. G. O., of the Housing Ordinance.

Code of General Ordinances, City of Dayton, State of Ohio, Section 806-83C:
Section 806-83C. PENALTIES.
A violation of any provision of this ordinance shall constitute a misdemeanor, and upon conviction thereof, the violator shall be punished by a fine of not less than twenty dollars ($20.00) nor more than two hundred dollars ($200.00) or by imprisonment of not less than two (2) days nor more than thirty (30) days, or both, and each day of failure to comply with any such provision shall constitute a separate violation.

V. STATEMENT OF THE CASE

On the 9th day of November, 1972, a Mr. Baxter executed an affidavit in the criminal division of

the Municipal Court of Dayton, Ohio, alleging in essence as follows, upon which a warrant for petitioner's arrest was issued, in Case No. 365144 upon the docket of that court:

"* * * that on or about the 8th day of November A.D. 1972, in the City of Dayton and in the County of Montgomery, and in the State of Ohio, did Walter Otto unlawfully fail to obey the legal orders of the Housing Inspector in regard to certain dwelling unit owned and occupied by the said Walter Otto, and located at 121-23 Rebecca, in said city. * * *. Contrary to the form of the ordinances to-wit: Section 806-31 C. G. O. of Dayton, Ohio."

This petitioner, Walter Otto, was tried by jury upon the issues raised by the charge in the affidavit, and the jury did sign and return and render the following verdict, as was filed in the record of the Municipal Court of Dayton, Ohio on June 1, 1973.

"We, the jury, being duly impaneled and sworn, do find the Defendant Walter Otto guilty of the charge of failure to obey the orders of Housing Inspector in violation of Section 806-31 of the Codified Ordinances of the City of Dayton, Ohio, as we do so render our verdict upon the concurrence of all twelve members of our jury.

"Each of us concurring in this verdict signed his or her name on the 1st day of June, 1973."

On June 7, 1973, the following judgment and sentence was imposed and entered upon the journal of the trial court:

"This cause coming on before the jury duly impaneled and sworn, and the said jury having heard the testimony adduced by the parties, the exhibits, the arguments of counsel, and the charge of the Court, after deliberation thereon, returned the following verdict, to-wit;

"'We, the jury in this case, being impaneled and sworn, do find upon the issues in this case, the defendant, Walter Otto, GUILTY as charged in the affidavit and do render our verdict upon the concurrence in said verdict signs his name this 1st day of June, 1973.'

"* * *

"IT IS, THEREFORE, considered and adjudged by the Court that Walter Otto the defendant, pay or secure to be paid a fine of $200.00 and that he pay the costs of prosecution, and the costs of Jury in the amount of $215.85 for which judgment is rendered against him, and execution awarded.

"It is further ordered that $200.00 of the fine be and the same hereby is suspended upon the future good behavior of the defendant and upon further condition that he has no more violations, of a similar nature."

The jury verdict quoted in the above journal entry is an untrue specification of the only verdict the jury did sign and return and render in the case, and as was filed in the record in the trial court on June 1, 1973.

On May 27, 1975 petitioner filed an amended complaint in the trial court requesting that the judgment and sentence made and entered June 7, 1973 be vacated or set aside.

In said amended complaint petitioner does allege that said judgment and sentence does infringe rights of liberty or property, without due process of law, repugnant to the due process clause of Amendment 14, United States Constitution; particularly, on the following grounds.

1. Petitioner was judged and sentenced upon a fake, sham or pretense jury verdict which was not signed and returned by the jury nor accepted by the court in the presence of petitioner;

2. Petitioner was judged and sentenced without being found guilty upon a charge that was made and upon which he was tried;

3. Petitioner was judged and sentenced without a finding that the matter charged against petitioner, or found against petitioner, did take place within the territorial jurisdiction of the trial court, or within the State of Ohio.

4. Petitioner was judged and sentenced under provisions of Section 806-31 of the Code of General Ordinances of the City of Dayton, State of Ohio, making it an offense punishable by imprisonment and fine for any person merely to fail to obey the order of housing inspector.

5. Petitioner was judged and sentenced by a court that had no jurisdiction of the subject matter in this case, and that had no jurisdiction to render said judgment and sentence.

The prayer of the amended complaint was denied by journal entry on June 5, 1975, without hearing of any kind, and without opinion.

This order of the Municipal Court of Dayton, Ohio, was appealed to the Court of Appeals of Montgomery County, Ohio, where the federal questions sought to be reviewed were raised by assignments of error, in Case No. 4933. That Court of Appeals, by opinion rendered January 19, 1976, did find nothing in the record which, in their opinion, would support or justify a reversal of the original judgment and sentence, and accordingly the judgment would be affirmed. On February 2, 1976, the appeals court did affirm the judgment of the Municiapl Court of Dayton, Ohio, pursuant

to the decision rendered by that court on January 19, 1976.

This judgment of the Court of Appeals was appealed to the Supreme Court of Ohio, where the federal questions sought to be reviewed were raised by propositions of law, in Case No. 76-314. On June 11, 1976, without separate opinion, by journal entry, the Supreme Court of Ohio dismissed the appeal for the reason no substantial constitutional question existed therin, in their opinion.

VI. AMPLIFYING ARGUMENT FOR ALLOWANCE OF THE WRIT

The Supreme Court of Ohio has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court, as hereinafter more fully and clearly appears.

A. First question decided by the Supreme Court of Ohio and argument thereon

1. Whether Section 806-31 of the Code of General Ordinances of the City of Dayton, State of Ohio, making it an offense, punishable by imprisonment and fine, for any person merely to fail to obey the order of a housing inspector is too indefinite, restrictive and liberty or property depriving to represent a proper and authorized exercise of the police power and is invalid in such respect, on the ground of its being repugnant to the due process of law clause of Amendment 14 to the Constitution of the United States.

Section 806-31 of the Code of General Ordinances of the City of Dayton, State of Ohio, defines as criminal the offense of "* * * failing to comply with the order served pursuant to this section * * *"

This ordinance section, in practical operation, as shown by the jury verdict accepted in open court and filed in the record of the trial court on June 1, 1973, makes criminal the mere failure of any person to obey the order of a housing inspector. The punishment for this offense includes up to 30 days imprisonment or up to $200.00 fine, or both, for each day of failure to comply, as set forth in Section 806-83C of said Code of General Ordinances.

Persons in the State of Ohio possess rights of liberty and property protected by Amendment 14 to the Constitution of the United States, and by merely failing to comply with an order served or by merely failing to obey the order of a housing inspector, without more, petitioner commits no crime. It must be noted that the ordinance section in question applies to any person.

Amendment 14 to the Constitution of the United States provides in part;

"* * *nor shall any State deprive any person of * * * liberty or property without due process of law; * * *"

By reason of the foregoing, Section 806-31 of the Code of General Ordinances of the City of Dayton, State of Ohio is in conflict with this provision of Amendment 14 to the Constitution of the United States.

A warrant for the arrest of petitioner was issued for violation of the ordinance section in question, and the very existence of this ordinance section provides the means by which citizens may be seized and charged with a criminal offense carrying sanctions of incarceration, fine, and a criminal record.

The 4th Amendment of the Constitution of the United States provides in part:

"The right of the people to be secure in their persons * * * against unreasonable * * * seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, * * *"

The 4th Amendment shields the citizen from being seized by police without probable cause.

Accordingly, petitioner argues that the ordinance section in question violates rights secured to the people by Amendment 4 to the Constitution of the United States as applied to the States by the due process of law clause of Amendment 14 to the Constitution of the United States.

Section 806-31 of the Code of General Ordinance of the City of Dayton, State of Ohio, is so indefinite that men of common intelligence are necessarily required to guess at its meaning, either as to the persons within the scope of the act, or the scope of the order within the scope of the act, or as to applicable tests to ascertain guilt, as violates the first essential of due process of law. Connally v. General Construction Co., 269 U.S. 385, 391; Winters v. New York, 333 U.S. 507, 509-510, 515 (1948).

The ordinance section in question has as a plain purpose the imposition of criminal penalties against the liberty or property of any person merely failing to comply with the order served pursuant to this section, or the mere failure to obey the order of a housing inspector, which purpose does not bear a real and substantial relation to health, safety, morals or general welfare of the public, as it must for said ordinance section to be valid. Triegle v. Acme Homestead Asso., 297 U.S. 189, 197 (1934); Liggett (Louis K.) Co. v. Baldridge, 278 U.S. 105, 111-112 (1928).

The ordinance section in question makes it a criminal offense, punishable by fine and imprisonment for any person merely to fail to comply with an order served, or to merely fail to obey the order of a housing inspector, without any person being given notice of hearing and opportunity to be heard in defense against the reasonability and validity of said order, as violates immutable principles of justice which no State of the Union may disregard. Powell v. Alabama, 287 U.S. 45, 68 (1932); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

For one or more or all of the reasons stated, Section 806-31 of the Code of General Ordinances of the City of Dayton, State of Ohio, is too indefinite, restrictive and liberty or property depriving to represent a proper and authorized exercise of the police power and is invalid in such respect, on the ground of its being repugnant to the due process of law clause of Amendment 14 to the Constitution of the United States.

B. Second question decided by the Supreme Court of Ohio and argument thereon

2. Whether the act of the Municipal Court of Dayton, Ohio, imposing judgment and criminal penalties upon the accused, in a case tried by jury, without any jury verdict finding the accused guilty of any offense alleged in the affidavit, occurring at any time or at any place within the State of Ohio, is an act as deprives the accused of fundamental rights of liberty or property, without due process of law, as specially set up or claimed under Amendment 14 to the Constitution of the United States.

The only jury verdict in this case was filed June 1, 1973, and that jury verdict did find this petitioner GUILTY of failure to obey the orders of a housing inspector in violation of Section 806-

31 of the Code of General Ordinances of the City of Dayton, Ohio, without more.

The jury did not find this petitioner guilty of any offense alleged in the affidavit, filed in the record of the trial court on November 9, 1972, in that the jury did not respond to any of the following trial issues raised by the charge in the affidavit:

1. That petitioner did fail to obey orders of a housing inspector in regard to a certain dwelling unit owned and occupied by petitioner, and located at 121-33 Rececca, in the City of Dayton, State of Ohio.

2. That any order of a housing inspector petitioner did fail to obey was a reasonable and legal order, in writing, and properly served, pursuant to the ordinance section in question.

3. That the crime charged was committed on or about November 8th, 1972.

4. That the crime charged was committed within the territorial jurisdiction of the trial court, or within the State of Ohio.

For the reasons stated the jury verdict was so unresponsive to the issues submitted, as raised by the charge in the affidavit, that it did not decided the question in issue in such a way as to enable the trial court to intelligently base a judgment thereon. Nevertheless, on June 7, 1973, the trial court did impose and enter judgment upon this accused, with criminal penalties of fine of $200.00 and costs in the amount of $215.85, with the fine suspended upon the future good behavior of this petitioner and upon further condition that he has no more violations, of a similar nature.

Amendment 6 to the Constitution of the United States provides in part:

"In all criminal prosecutions the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * *"

Accordingly, petitioner argues that the act of the trial court in question violates the right secured to accused in all criminal prosecutions, by the above provision of Amendment 6 to the Constitution of the United States, as applied to the States by the due process of law clause of Amendment 14 to the Constitution of the United States.

The act of the trial court imposing judgment and sentence upon the accused in a criminal prosecution under the circumstances depicted, and as apparent and manifest from the record, is of such quality as necessarily prevents a fair trial.

In similar regard, this court has decided as follows:

"Due process of law" requires that the proceedings shall be fair. Snyder v. Massachusetts, 291 U.S. 97, 116, 117 (1934).

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219 (1941).

"The due process clause", as applied in criminal trials "requires that action by a State through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions." Buchalter v. New York, 319 U.S. 427, 429 (1943).

Amendment 14 to the Constitution of the United States provides:

"* * * nor shall any State deprive any person of * * * liberty or property, without due process of law * * *".

For one or more or all of the reasons stated, the act of the trial court in question did deprive this accused of fundamental rights of liberty or property, without due process of law, as specially set up or claimed under the due process of law clause of Amendment 14 to the Constitution of the United States.

C. Third question decided by the Supreme Court of Ohio and argument thereon

3. Whether the act of a trial court imposing judgment and criminal penalties upon a jury verdict never filed in the record of the trial court, and never signed by any juror, and never received in open court by any judge or magistrate in the presence of any juror or the accused, and as never did exist in the case, in an act as deprives the accused of fundamental rights of liberty or property, without constitutional due process of law, as specially set up or claimed under amendment 14 to the Constitution of the United States.

The only jury verdict of which the trial court speaks in its judgment entry journalized on June 7, 1973 does find this petitioner GUILTY as charged in the affidavit.

As apparent and manifest from the record in the trial court, including the Bill of Exceptions (transcript of proceedings at trial), the jury verdict spoken of in said judgment entry was never filed in the record of the trial court, was never signed by any juror, was never received in open court by any judge or magistrate in the presence

of any juror or this petitioner, and never did exist in the case.

In further support of petitioners view on this third question petitioner adopts and incorporates and inserts herein by this reference the material and relevant argument in part "B" of this amplifying argument.

WHEREFORE, the Writ of Certiorari prayed for should be granted.

Respectfully submitted,

Walter Otto, Petitioner

PROOF OF SERVICE

I, Walter Otto, the petitioner herein do solemnly swear (or affirm) that three copies of this Petition for Writ of Certiorari were served upon all parties required to be served, by delivery, at the office of counsel of record, to counsel or a clerk therein.

Walter Otto, Petitioner

A-1
APPENDIX

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

CITY OF DAYTON :
Plaintiff-Appellee :
vs. : CASE NO. 4933
WALTER OTTO :
Defendant-Appellant:

. . . . . .

O P I N I O N

Rendered on the 19th day of January, 1976.

. . . . . .

BY THE COURT:

The defendant, Walter Otto, was tried by jury in the Municipal Court of Dayton and found guilty of failing to obey orders of a housing inspector in violation of Section 806-31 of the Codified ordinances of the City of Dayton, Ohio. From the judgment and sentence thereupon entered in the trial court, Mr. Otto appealed to the Court of Appeals where the judgment was affirmed on November 13, 1973. See City of Dayton v. Otto, Case No. 4320, (1973). The cause was subsequently dismissed by the Supreme Court of Ohio on May 10, 1974 for the reason that no substantial constitutional question existed therein.

On April 23, 1975, Mr. Otto filed what has been styled a "complaint for post-conviction" requesting that the previous judgment and sentence be vacated and set aside. The prayer of the amended complaint was denied on June 5, 1975, and this order of the Municipal Court apparently provides the basis for the present appeal.

For his assignments of error, the appellant urges that the trial court (1) erred in the judgment and sentence and (2) erred for reasons apparent and manifest from the record.

A-2

We have carefully examined the arguments in support of each of the alleged errors and find nothing in the record which, in our opinion, will support or justify a reversal of the original judgment and sentence.

Accordingly, the judgment will be affirmed.

KERNS, P. J., SHERER and McBRIDE, JJ. concur.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, City of Columbus.	:	1976 TERM To wit: June 11, 1976
City of Dayton, Appellee,	:	No. 76-314
vs.	:	APPEAL FROM THE COURT OF APPEALS
Walter Otto, Appellant.	:	for MONTGOMERY County

This cause, here on appeal as of right from the Court of Appeals for MONTGOMERY County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for MONTGOMERY County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of June 30, 1976

Thomas L. Startzman _____ Clerk

/ s / _____ Deputy

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. 76-233

CITY OF DAYTON,

Respondent

vs.

WALTER OTTO,

Petitioner

BRIEF FOR RESPONDENT IN OPPOSITION

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CITATIONS TO OPINIONS BELOW

Petitioner is not aware of the publication of any of the decisions delivered in the courts below.

JURISDICTION

The jurisdictional requisites adequately appear in the Petition.

QUESTIONS PRESENTED FOR REVIEW

Petitioner's three questions properly stated are:

1. Whether Section 806-31, Code of General Ordinances of The City of Dayton,is so indefinite as to violate the Fourteenth Amendment to the Constitution of the United States.

2. Whether a jury verdict in a criminal case which merely states the defendant is guilty as charged violates the Due Process provision of the Constitution of the United States.

3. Whether the juror in a criminal case must sign both the verdict and the Entry which is filed by the trial judge.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are set out in the petition.

COUNTER-STATEMENT OF CASE

In September of 1971, a City Housing Inspector, Mr. Gary Horseman, inspected the exterior of the dwelling at 123 Rebecca. He determined that eleven (11) violations of The City of Dayton Housing Code existed at the dwelling. He reduced these violations to a written form Numbered N 684, titled "Notice of Violations and Orders for Compliance." No other notice and order would bear this number. The said notice was served personally upon Mr. Otto, on February 29, 1972, by Mr. Roger Baxter who explained the notice to Mr. Otto. This notice and order set out the housing violations which the inspector determined to exist at 123 Rebecca and ordered specific remedial action to correct each of the violations indicated in the said notice. The notice further provided that such repairs must be accomplished within sixty days of the date of service.

On November 8, 1972, a re-inspection of the exterior of the dwelling was made by Mr. Baxter. None of the violations appearing on the notice and order had been corrected.

Thus, on November 9, 1972, Mr. Baxter filed a complaint affidavit in Dayton Municipal Court, Criminal Division. Said complaint charged that:

> "On or about the 8th day of November, 1972, in the City of Dayton, County of Montgomery, State of Ohio, Walter Otto did unlawfully fail to obey the legal order of a housing inspector in regard to a certain dwelling owned and occupied by said Walter Otto, located at 121 and 123 Rebecca Street in said City of Dayton, Ohio contrary to Section 806-31, Code of General Ordinances of The City of Dayton."

Trial was held in Dayton Municipal Court, Criminal Division, Honorable Erwin Kilpatrick presiding, on May 31 and June 1, 1973.

In his charge to the Jury on June 1, 1973, Judge Kilpatrick explained the charge against the Petitioner, Mr. Otto, as follows:

> "... The affidavit in this case charges that on or about the 8th day of November, 1972, in the City of Dayton, County of Montgomery, State of Ohio, Walter Otto did unlawfully fail to obey the legal orders of a housing inspector in regard to certain dwelling owned and occupied by said Walter Otto, located at 121 and 123 Rebecca Street, in said City of Dayton, Ohio, contrary to Section 806-31, Code of General Ordinances of the City of Dayton ..."

On June 1, 1973, the jury returned the following verdict, in open court with all jurors, Mr. Otto, Judge Kilpatrick and the Prosecutor present:

> "We, the jury, being impaneled and sworn, do find the Defendant Walter Otto guilty of the charge of failure to obey orders of Housing Inspector in violation of Section 806-31 of the Codified Ordinances of the City of Dayton, Ohio, and we do so render our

verdict upon the concurrence of all twelve members of our jury.

"Each of us concurring in this verdict signed his or her name on this 1st day of June, 1973."

On June 7, 1973, the Judgment Entry was filed; it read as follows:

"This cause coming on before the jury duly impaneled and sworn, and the said jury having heard the testimony adduced by the parties, the exhibits the arguments of counsel, and the charge of the Court, after deliberation thereon, returned the following verdict, to-wit:

'We, the Jury in this case, being impaneled and sworn, do find upon the issues in this case, the defendant, Walter Otto, GUILTY as charged in the affidavit and do render our verdict upon the concurrence in said verdict signs his name this 1st day of June, 1973.'

Julia M. Wical
John D. Sorrell
Twila H. Oldham
Bettey V. Johnson
Bettie Ray
Elmer Will
Guy Hunley
John B. Carter
Eunice O. Munger
Clara M. Shelley
Julian Brooks
Helen C. Goecke

"IT IS, THEREFORE, considered and adjudged by the Court that Walter Otto, the defendant, pay or secure to be paid a fine of $200.00 and that he pay the costs of prosecution, and the costs of Jury in the amount of $215.85 for which judgment is rendered against him, and execution awarded.

"It is further ordered that $200.00 of the fine be and the same hereby is suspended upon the future good behavior of the defendant and upon further condition that he has no more violations, of a similar nature."

Petitioner then appealed to the Court of Appeals of Montgomery County, Ohio, Case No.4320. Said Court of Appeals in an opinion rendered on November 13, 1973, affirmed the order and judgment of the Dayton Municipal Court. On February 19, 1974, Petitioner filed a Memorandum in Support of Claimed Jurisdiction, in the Supreme Court of Ohio, Case No. 74-153. On April 26, 1974, the Supreme Court on its own motion dismissed the case for the reason that no substantial constitutional question exists.

Petitioner filed an Amended Complaint with Dayton Municipal Court. Said Amended Complaint, which prayed that Petitioner be relieved from the judgment of Dayton Municipal Court, was denied. Petitioner again appealed to the Court of Appeals of Montgomery County, Ohio, Case No. 4933. The Court of Appeals on January 19, 1976 rendered an opinion which affirmed the Municipal Court's opinion on both the Amended Complaint and the original judgment and sentence.

Petitioner then sought to appeal the decision of the Court of Appeals, of Montgomery County, Ohio, to the Supreme Court of Ohio, (Case No. 76-314). The Supreme Court of Ohio on June 11, 1976 dismissed Petitioner's Appeal for the reason that it did not involve any substantial constitutional questions.

REASONS FOR DENYING THE WRIT

No decision of the highest state court of Ohio has been made in which the validity of a state statute has been drawn in question on the ground of its being repugnant to the United States Constitution, or where any title, right, privilege or immunity is specially set up or claimed under the United States Constitution.

THE DECISION BELOW DID NOT INVOLVE FEDERAL QUESTIONS BELOW

Petitioner's brief attempts to fashion an appeal from a decision of the Ohio Supreme Court. In reality the Supreme Court of Ohio, refused to take jurisdiction over Petitioner's appeal for the reason that it involved no substantial constitutional question.

In American R. Express Co. v. Levee, (1923) 263 U.S. 19, 68 L.Ed. 40, 44 S 11, this Court held that the refusal of the highest state court to hear an appeal from a decision of an intermediate State court was not the decision of the highest state court for purposes of appeal to the U.S. Supreme Court. The refusal, however, did make the decision of the intermediate appellate court, the decision of the highest state court that could be had. Petitioner's appeal is therefore not from the decision of the Ohio Supreme Court, but from the decision of the Court of Appeals of Montgomery County, Ohio, in Case No. 4933.

The basis of Petitioner's appeal in the Court of Appeals of Montgomery County, Ohio, Case No. 4933, is impossible to determine from

Petitioner's numerous briefs, due to his rambling, almost incoherent style of writing. The Court itself had difficulty in determining the grounds for Petitioner's appeal, but finally made the following observation in its opinion:

> "On April 23, 1975, Mr. Otto filed what has been styled a 'complaint for post-conviction remedies,' and on May 27, 1975, he filed an 'amended complaint' requesting that the previous judgment and sentence be vacated and set aside. The prayer of the amended complaint was denied on June 5, 1975, and this order of the Municipal Court apparently provides the basis for the present appeal."

The decision of the Court of Appeals of Montgomery County, Ohio in Case No. 4933, did not involve the constitutionality of Petitioner's conviction, or the validity of Section 806-31, Code of General Ordinances of the City of Dayton, Ohio. Under the American R. Express case, this is the decision from which Petitioner is appealing.

The questions Petitioner presents in his brief, should have been raised in Case No. 4320 in the Court of Appeals of Montgomery County, Ohio, which was filed immediately following Petitioner's conviction in Dayton Municipal Court. Under Rule 22(2) of the Supreme Court Rules, Petitioner should have filed his appeal to this Court on the constitutionality of his conviction in early 1974. Petitioner having failed to file a timely appeal concerning those issues, is now attempting to do so by filing Petition for a Writ of Certiorari, which involves issues not litigated in the State Courts.

CONCLUSION

Petitioner has failed to demonstrate that his appeal has any substance under Title 28 Section 1257(3) of the United States Code. Thus, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES W. DRAKE,
CITY ATTORNEY

Edward M. Taylor, Jr.

Edward M. Taylor, Jr.
Assistant City Attorney
609 Municipal Building
Dayton, Ohio 45401

Attorney for Respondent

CERTIFICATE OF SERVICE

This is to certify that a copy of the within Brief for Respondent in Opposition, was mailed by regular mail, post-paid, to the Petitioner Walter Otto, 1017 Linda Vista Avenue, Dayton, Ohio 45405, this 10th day of September, 1976.

Edward M. Taylor, Jr.
Edward M. Taylor, Jr.
Asst. City Attorney

Supreme Court, U. S.
FILED
OCT 5
MICHAEL RODAK, JR. CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. 76-233

CITY OF DAYTON,

Respondent

VS.

WALTER OTTO,

Petitioner

REPLY BRIEF FOR PETITIONER

WALTER OTTO, Petitioner
1017 Linda Vista Avenue
Apartment 8
Dayton, Ohio 45405

REPLY BRIEF FOR PETITIONER

The Supreme Court of Ohio, in Case No. 76-314, after hearing, did decide the substance of federal questions there raised by Propositions of Law set forth in petitioner's brief, and here presented in the petition, in deciding no substantial constitutional question did exist in the appeal as of right.

The Court of Appeals of Montgomery County, Ohio, in Case No. 4933, carefully examined the arguments in support of each of the errors assigned: that the trial court (1) erred in the judgment and senttence and (2) erred for reasons apparent and manifest from the record. Those arguments, in the brief and reply brief of petitioner, did draw in question the validity of Section 806-31 of the Code of the City of Dayton, Ohio, on the ground of its being repugnant to the Constitution of the United States; and did specially set up or claim a right under the due process of law clause of Amendment 14 to the Constitution of the United States, involving the constitutionality of petitioner's conviction, judgment and sentence.

The questions presented for review in the petition involve issues litigated in the State courts, starting with the filing in the trial court of petitioner's Amended Complaint, upon which the trial court did rule, in Case No. 365144, Municipal Court of Dayton, Ohio, on June 5, 1975.

Accordingly, respondent's argument in its brief in opposition, that the decision

below did not involve federal questions below is without merit.

Respectfully submitted,

Walter Otto, Petitioner

AFFIDAVIT OF SERVICE

I, Walter Otto, the petitioner herein, do solemnly swear (or affirm) that three copies of this Reply Brief for Petitioner were served upon counsel for respondent, Edward M. Taylor, Jr., by delivery at his office to counsel or a clerk therein, at 609 Municipal Building, Dayton, Ohio 45401, this day, September ____, 1976.

Walter Otto, Petitioner
1017 Linda Vista Avenue
Apartment 8
Dayton, Ohio 45405